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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 8, 12, 16, and 52

**[FAC 2005-66; FAR Case 2011-025; Item II; Docket 2011-0025,
Sequence 1]**

RIN 9000-AM28

**Federal Acquisition Regulation; Changes to Time-and-Materials
and Labor-Hour Contracts and Orders**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to provide additional guidance when raising the ceiling price or otherwise changing the scope of work for a time-and-materials (T&M) or labor-hour (LH) contract or order.

DATES: Effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202-208-4949, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-66, FAR Case 2011-025.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 77 FR 43780 on July 26, 2012, to address actions required when raising the ceiling price or otherwise changing the general scope of a T&M or LH contract or order. One respondent submitted a comment on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comment in the development of the final rule. The comment submitted agreed with the intent of the rule and praised it as a helpful change. The final rule is published without change from the proposed rule.

III. Executive Order 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Information and Regulatory Affairs (OIRA) has deemed that this is not a significant regulatory action and, therefore, was not

subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993, and that this rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

In finalizing FAR rule 2009-043 Time-and-Materials and Labor-Hour Contracts for Commercial Items it became apparent that the guidance in the FAR on raising the ceiling price for a T&M or LH contract or order was not clear or consistent throughout the FAR. This case was opened to clarify the procedures necessary to raise the ceiling price of a T&M or LH contract or order.

No significant issues were raised by the public and no changes were made to the proposed rule.

No comments were submitted by the Chief Counsel for Advocacy of the Small Business Administration.

This rule deals with the administration of T&M and LH contracts and orders and will have no direct effect on contractors. In FY2011 the Federal Government awarded 23,023 T&M and LH contracts or orders of which 6,315 went to small businesses. This rule will not affect how many small businesses are awarded this type of contract.

This rule does not add any new information collection requirements.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 8, 12, 16, and 52

Government procurement.

Dated: February 20, 2013.

Laura Auletta,
Director,
Office of Governmentwide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 8, 12, 16, and 52 as set forth below:

1. The authority citation for 48 CFR parts 8, 12, 16, and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

2. Amend section 8.404 by revising paragraph (h)(3)(iv) to read as follows:

8.404 Use of Federal Supply Schedules.

* * * * *

(h) * * *

(3) * * *

(iv) Prior to an increase in the ceiling price of a time-and-materials or labor-hour order, the ordering activity shall—

(A) Conduct an analysis of pricing and other relevant factors to determine if the action is in the best interest of the Government and document the order file;

(B) Follow the procedures at 8.405-6 for a change that modifies the general scope of the order; and

(C) Comply with the requirements at 8.402(f) when modifying an order to add open market items.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

3. Amend section 12.207 by revising paragraph

(b)(1)(ii)(C) to read as follows:

12.207 Contract type.

* * * * *

(b)(1) * * *

(ii) * * *

(C) Prior to increasing the ceiling price of a time-and-materials or labor-hour contract or order, shall—

(1) Conduct an analysis of pricing and other relevant factors to determine if the action is in the best interest of the Government;

(2) Document the decision in the contract or order file; and

(3) When making a change that modifies the general scope of—

(i) A contract, follow the procedures at 6.303;

(ii) An order issued under the Federal Supply Schedules, follow the procedures at 8.405-6; or

(iii) An order issued under multiple award task and delivery order contracts, follow the procedures at 16.505(b)(2).

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PART 16—TYPES OF CONTRACTS

16.504 [Amended]

4. Amend section 16.504 by removing from paragraph (a)(4)(v) “(see 16.505(b)(6))” and adding “(see 16.505(b)(8))” in its place.

5. Amend section 16.505 by—

a. Removing from paragraph (b)(1)(iv)(E) “paragraph (b)(4)” and adding “paragraph (b)(6)” in its place;

b. Redesignating paragraphs (b)(4) through paragraphs (6) as paragraphs (b)(6) through (8), respectively; and

c. Adding new paragraphs (b)(4) and (5) to be read as follows:

16.505 Ordering.

* * * * *

(b) * * *

(4) For additional requirements for cost reimbursement orders see 16.301-3.

(5) For additional requirements for time-and-materials or labor-hour orders, see 16.601(e).

* * * * *

6. Amend section 16.601 by—

a. Removing from paragraph (c)(2)(i) “(see 16.601(e)(1))” and adding “(see 16.601(f)(1))” in its place;

b. Revising the paragraph (d) introductory text and paragraph (d)(2);

c. Redesignating paragraph (e) as paragraph (f);
and

d. Adding a new paragraph (e) to read as follows.

16.601 Time-and-materials contracts.

* * * * *

(d) Limitations. A time-and-materials contract or order may be used only if—

* * * * *

(2) The contract or order includes a ceiling price that the contractor exceeds at its own risk. Also see 12.207(b) for further limitations on use of time-and-materials or labor-hour contracts for acquisition of commercial items.

(e) Post award requirements. Prior to an increase in the ceiling price of a time-and-materials or labor-hour contract or order, the contracting officer shall—

(1) Conduct an analysis of pricing and other relevant factors to determine if the action is in the best interest of the Government;

(2) Document the decision in the contract or order file; and

(3) When making a change that modifies the general scope of—

(i) A contract, follow the procedures at 6.303;

(ii) An order issued under the Federal Supply Schedules, follow the procedures at 8.405-6; or

(iii) An order issued under multiple award task and delivery order contracts, follow the procedures at 16.505(b)(2).

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.216-29 [Amended]

7. Amend section 52.216-29 introductory text by removing from "16.601(e)(1)" and adding "16.601(f)(1)" in its place.

52.216-30 [Amended]

8. Amend section 52.216-30 by removing from the "16.601(e)(2)" and adding "16.601(f)(2)" in its place.

52.216-31 [Amended]

9. Amend section 52.216-31 introductory text by removing "16.601(e)(3)" and adding "16.601(f)(3)" in its place.

[BILLING CODE 6820-EP]

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